Registry's translation, the French text alone being authoritative.

EIGHTY-FIRST SESSION

In re ANTOINET (No. 3), AYMON (No. 3), BALL (No. 4) and BORGHINI (No. 4)

Judgment 1515

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaints filed by Mr. Gérard Antoinet and Mr. Marcel Aymon and the fourth complaints filed by Mr. Derek Ball and Mr. Michel Borghini against the European Organization for Nuclear Research (CERN) on 13 June 1995 and corrected on 31 August, CERN's reply of 13 December 1995, the complainants' single rejoinder of 2 February 1996 and the Organization's surrejoinder of 26 April 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A.CERN, an organisation with headquarters at Geneva, has a procedure for the periodic adjustment of staff pay. Judgment 1329 (in re Ball and Borghini) described that procedure under A. And Judgment 1368 (in re Aymon, Ball No. 2 and Borghini No. 2), which was about how to follow it, sent the case back for the Organization to decide on the complainants' pay for January 1993 according to lawfully determined scales.

On 14 and 15 December 1993, at its 247th Session, the Finance Committee recommended that the Council of CERN should set at 1.6 per cent the comprehensive "cost variation index" for the staff budget in 1994. On 17 December, at its 98th Session, the Council endorsed that recommendation and approved the index.

The pay slips that the complainants got on 20 and 21 January 1994 for that month showed rises of some 1.2 per cent. On 11, 14 and 18 March they lodged appeals with the Joint Advisory Appeals Board. In letters of 11 May 1994 to its chairman they challenged the Board's membership, of which they had been informed. On 10 August a new chairman told them that the Director-General had set up an entirely new Board.

Judgment 1368 was published on 13 July 1994. The Administration invited the Finance Committee to recommend, at its meeting of 28 September 1994, that the Council approve retroactive rises in pay for 1993 and 1994, the same procedure having been followed for both years. The Committee recommended rises of 1.2 per cent in pay for 1994.

By a letter of 26 October Mr. Borghini applied to the Director-General for a stay of proceedings pending the Council's decision. The Director-General consented in a letter of 27 October.

At a meeting on 16 December the Council unanimously endorsed the Committee's recommendation. By a letter of 25 January 1995 Mr. Borghini asked the Director-General to say how the decision would affect the pay of each complainant and, if he confirmed the pay rises for 1994 as originally announced, to resume the appeal proceedings.

In letters of 15 March 1995 the Director-General told the complainants that basic pay was raised by 1.2 per cent as from 1 January 1994 and that they could go straight to the Tribunal.

By a letter of 5 May 1995 Mr. Borghini informed the Director-General that the complainants were dropping their internal appeals.

B.The complainants submit that CERN acted in breach of its own obligations and of their acquired rights by resuming the procedure for adjustment of pay after the publication of Judgment 1368 and by getting the Council to approve the pay scales that the Director-General had set earlier.

Their first plea is that the Council did not actually exercise its authority to set the budget. All it did in December 1993 was to adopt a comprehensive cost-variation index for the staff budget, thereby leaving the Director-General free to distribute the 1.6 per cent increase between the various heads of expenditure. Again, in September and December 1994, the Finance Committee and the Council endorsed decisions of the Director-General's without considering whether the cost variation index for 1994 was right. They thereby offended against res judicata.

Secondly, CERN neither applied nor even heeded the method it had approved in 1979 of periodic review of pay. It disregarded one thing that the method made it compulsory to take account of: the cost of living at Geneva in the twelve months from August of the year preceding that of review. It made mistakes of fact and law by setting at 1.6 per cent the comprehensive rise in such expenditure in staff in 1994. That figure was quoted in a proposal by one delegation and purported to align the expenditure on staff with rises in such expenditure at the European Molecular Biology Laboratory (EMBL), though there was no basis in law for such alignment. Besides, the rises in pay at the Laboratory were unlawful.

Thirdly, the complainants see breach of their acquired rights in the fall - which they put at some 10 per cent - in the purchasing power of their pay over the past few years.

They want the Tribunal to order CERN to disclose transcripts of the tape recordings - or the tapes themselves - of the discussions that the Finance Committee held on 14 December 1993 and the Council on 17 December 1993 on the cost variation index for 1994. They seek the quashing of the impugned decisions and costs.

C.In its reply CERN says that the Finance Committee took up the matter of the cost variation index on 28 September 1994, and the Council on 16 December 1994. Each of them had before it a paper headed "Salary scales for 1993 and 1994", which CERN had circulated beforehand and which afforded a basis for the recommendation of 1.2 per cent rises in staff pay for 1994.

In the Organization's submission there was no breach of the method of adjusting pay. It was under no duty to heed the cost of living at Geneva, though the Council did take the cost variation index as a guide in putting a figure on the rise in pay. The idea of the 1.6 per cent increase in the staff budget did come from a delegation that wanted the same comprehensive increase at CERN as at EMBL, but the proposal did not rest on the position in fact and law at the Laboratory.

Since the 1979 method is not binding, there can be no breach of any acquired right in granting only part of the rise in pay worked out by that method. In any event withholding the full amount of the increase did not impair the terms of the complainants' employment. CERN contests their estimate of loss of purchasing power.

D.In their rejoinder the complainants enlarge on their pleas and press their claims.

E.In its surrejoinder CERN submits that the complainants' rejoinder offers no new fact or plea that makes any difference to its position.

CONSIDERATIONS:

1.The complainants, who are employees of CERN, are challenging decisions in their pay slips for January 1994. The figures of their pay showed a rise of 1.2 per cent in line with a budget decision that the Organization's Council had taken on 17 December 1993. They began by lodging internal appeals but there was a stay in the proceedings. Judgment 1368 (in re Aymon, Ball No. 2 and Borghini No. 2) ruled that a decision the Council had taken on 18 December 1992 afforded no sound basis in law for the scales of staff pay for 1993. Realising that the scales it had adopted for 1994 were flawed on the same grounds, the Administration decided to put the matter to the Finance Committee and then to the Council so that new scales might be lawfully adopted and made retroactive. On 28 September 1994 the Committee recommended 1.2 per cent rises in pay and on 16 December 1994 the Council approved them. The complainants asked that the internal proceedings resume but the Director-General suggested direct appeal to the Tribunal, and they agreed.

2.They do not deny that CERN has to correct the pay scales. But they have three objections to the decision of 16

December 1994: first, failure by the Council to exercise its authority to set the budget and approve pay scales; secondly, failure to follow the approved method of adjusting pay; and thirdly, breach of acquired rights.

3.The Tribunal's answer to their first objection is in Judgment 1514 (in re Aymon No. 2, Ball No. 3, and Borghini No. 3), also delivered this day. The members of the Finance Committee and the Council had time enough to study the paper explaining how the scales for 1994 had been drawn up and referring to another, distributed earlier, about the cost variation index for 1994. So the material that the competent bodies relied on set out the relevant criteria and they did not fail to exercise their authority to set the budget. Had they so wished, the Committee might have recommended, and the Council approved, bigger rises in pay than those that went through.

4.The second plea is about method. Here again the Tribunal is satisfied on the evidence that, as in its review of pay for 1993, CERN did not overlook the index established for the purpose, though the components of the method are not binding on CERN anyway. But rather more must be said about the charges of mistakes of law and fact in the decision of December 1993 to raise expenditure on staff by 1.6 per cent. True, CERN argues that any mistakes there might have been would make no difference to the challenged decisions since they would have affected only the rise in expenditure on staff for 1994. But the complainants' plea would succeed if they could show flaws in the setting of the budget that had an effect on the rises in pay. And the Tribunal will be more alert to the possibility of such flaws because expenditure of staff in 1994 went up by 1.6 but staff pay by only 1.2 per cent.

5.The complainants submit that the Council, which sets the budget, erred in law and in fact by purporting to align pay rises at CERN and at the European Molecular Biology Laboratory (EMBL). They adduce cogent evidence to show any parallels that might have been drawn between pay rises at EMBL and the staff budget at CERN to be misleading and quite irrelevant. But they fail to prove that the Council meant to follow EMBL in setting at 1.6 per cent the increase in expenditure on staff. There was bitter debate in the Finance Committee on 14 and 15 December, and one delegation did suggest a comprehensive increase of 1.6 per cent, "as at EMBL", whereas the Administration wanted 4.53 per cent and some delegations wanted no increase at all. In the end, after several ballots, the figure of 1.6 per cent was carried. But it was a laborious compromise and there were no grounds for supposing that any analogy was drawn as to the position of staff between the two organisations. In endorsing the Committee's recommendation the Council said nothing of the Laboratory. There is no reason to allow the complainants' application for disclosure of the recordings of debate in the Committee and the Council. Those bodies have approved the minutes, which are therefore to be taken as an authentic record of the proceedings. There is no merit in the complainants' plea of mistakes of law and fact in the setting of the budget that determined the amount of the pay rises.

6.Their last plea is breach of acquired rights. Quibbling over figures aside, the 1.2 per cent rises in staff pay were obviously not enough to offset the fall in average purchasing power over the last few years: far from it. Yet the trend does not amount to breach of a fundamental term of the appointment of CERN staff. The plea fails in Judgment 1514, also delivered this day, as to the pay rises for 1993. It fails as to 1994 too.

7.Since the complainants' case does not succeed they get no costs.

DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas
Michel Gentot
Egli
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.